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Before the Federal Communications Commission
Washington, D.C. 20554

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In the Matter of

Qwest Corporation Petition for Declaratory Ruling Concerning Wholesale DSL Services and Sections 251 (c)(4) of the Act	)))	**WC Docket No. 02-77**

Reply Comments of the Minnesota Department of Commerce

Date: May 29, 2002

Anthony Mendoza
Minnesota Department of Commerce
85 7th Place East, Suite 500
St. Paul, Minnesota 55101-2198

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The Minnesota Department of Commerce (Department) respectfully submits its reply comments in the above proceeding. Specifically, the Department wishes to address some of the issues raised in the comments submitted by SBC and Sprint.

I. Sprint and SBC Misstate the Facts Surrounding the Qwest/MSN Docket Previously Before the Minnesota Public Utilities Commission

SBC and Sprint both submitted comments supporting Qwest's position in its petition. However, both comments failed to address the specific facts of the arrangement between Qwest and MSN, relying only on the language in Qwest's tariff and Qwest's petition.[1] The Department is uncertain whether either party has read the Department's initial comments to the Minnesota Public Utilities Commission (MPUC), or any other documents filed in the docket.[2] Neither party addresses the fact that the Department's comments were in reference solely to the relationship between Qwest and MSN, rather than Qwest and all of its Volume ISPs. Instead, Sprint urges the Commission to "...declare that Rule 51.605(c) applies to Qwest bulk DSL services..."[3] The Department has never asked the MPUC, the FCC, or any other entity to declare *all* of Qwest's bulk DSL services as retail, contrary to Sprint's implication. The Department has only addressed the relationship between Qwest and MSN, which is clearly a different arrangement than the one between Qwest and its other Volume ISPs.[4]

Further, SBC concludes that Qwest has demonstrated in its petition that "in the facts applicable to its case," MSN provides the retail service.[5] The Department is unaware of any evidence Qwest provided in its petition other than the Starliper affidavit stating that MSN is the retail provider. Qwest provided no copies of print advertisements, for example, showing that MSN markets the service. Nor did it provide any other evidence of its argument that its functions are minimal and separate from MSN's.[6] On the other hand, both in its comments to the MPUC and the comments in this docket, the Department provided copies of advertisements showing that Qwest advertises the service as well as other supporting evidence for its position.

Other statements that SBC relies on are unsupported by any evidence in the record in this case. SBC states that "[w]hile the Commission works to complete its examination...the states are acting."[7] SBC also states, "...the state action under scrutiny

[1] For example, SBC relies on Qwest's petition to ascertain the meaning of the Department's initial comments to the MPUC, instead of quoting directly from the Department's comments. SBC comments at 7.
[2] Docket No. P421/C-02-94.
[3] Sprint at 3.
[4] See the Department's comments in Docket WC 02-77 at 7.
[5] SBC at 6.
[6] For example, Qwest could have provided charts showing the separation of functions between MSN and Qwest, or scripts used by Qwest customer service representatives outlining exactly what parts of customer service Qwest performs.
[7] SBC at 7.

in this petition works to undermine the Commission's efforts..."[8] Had SBC reviewed the documents in the MPUC docket, it would have found that the MPUC specifically declined to act, even on the question of whether it had jurisdiction.[9] In its order, the MPUC stated it "...will not determine in this Order whether it has jurisdiction over any of the issues raised in the ISP's Complaint."[10] In that same Order, the MPUC dismissed the ISP's complaint *without prejudice*.[11]

Other statements in Sprint's comments inaccurately represent the Department's original comments to the MPUC. For example, Sprint states that "[t]he DOC claims that these contract services—billing, collection, and sales—make Qwest the retail provider of the service..."[12] Sprint's use of the word "sales" instead of "marketing"—the actual factor the Department used—misrepresents the nature of the relationship between Qwest and MSN. Qwest not only accepts orders from customers signing up for MSN; it affirmatively advertises the service, brands it as its own, and seeks out customers.[13] Evidence shows that Qwest even markets the service to consumers who have inquired only about Qwest voice services. In a recent complaint to the Department, a customer submitted a copy of a "cost analysis" provided by Qwest for its voice services. The cost analysis gives pricing information on the voice services the customer had inquired about, but also advertises other products available: one of those products is "DSL w/ MSN Internet Access" (see attached as Exhibit A).[14] The Department notes that not only are Qwest personnel promoting the product at every opportunity, but Qwest once again is branding the DSL service as its own. The service appears as one item in a list of several services Qwest offers. The cost analysis document does not label the service "MSN high speed internet," or "MSN DSL"; instead, it calls it "DSL," leading the consumer to believe that the DSL service is Qwest's.

II. Sprint and SBC Make Legal Arguments Contrary to Applicable Law

Aside from factual inaccuracies, SBC and Sprint rely on illogical legal arguments. SBC states that the Department's questioning of the Qwest/MSN arrangement is "expressly" contrary to the plain language of Section 51.605(c).[15] The Department disagrees. Section 51.605(c) states that "...advanced telecommunications services sold to Internet Service Providers as an input component to the Internet Service Providers' *retail* Internet service

[8] Id at 6.
[9] MPUC Order issued March 28, 2002, Docket No. P421/C-02-94.
[10] Id at 4.
[11] Id. As of today's date, the ISPs have not filed an additional complaint. The Department notes that it still has an open docket investigating the Qwest/MSN arrangement, but has been unable to take any action since March 26, 2002, when Qwest refused, in writing, to provide copies of the contracts between itself and MSN.
[12] Sprint at 2.
[13] See the Department's comments in this docket demonstrating that Qwest advertises the service and calls it "Qwest DSL" in its print ads.
[14] The referenced customer complaint was received at the Department's offices after the deadline for comments in this public notice.
[15] 47 C.F.R. 51.605(c).

offering shall not be considered to be telecommunications services on a *retail* basis..." (emphasis added). The express issue in the AOL Bulk Services Order was the definition of the word *retail.* The entity performing the retail functions—billing, collections, and marketing—was the entity providing the service at retail. Here, MSN does not perform the billing or collections, and Qwest clearly performs the marketing. Thus, the plain language of Section 51.605(c) accords with the Department's position. Qwest may be selling advanced telecommunications services in conjunction with an Internet Service Provider (MSN), but the DSL service is not an input component to MSN's *retail* offering because MSN does not perform the typical retail functions in the offering.

The weakness in SBC's argument (as well as Qwest's and Sprint's) is that SBC ignores the word "retail" when it first appears in 51.605(c). Instead, it focuses only on the word "retail" during its second appearance in the section. In other words, SBC's argument is that Section 51.605(c) mandates that an ILEC is not offering a service at retail *whenever* it sells bulk DSL services to an ISP. That is not what the rule states. SBC ignores the fact that the bulk DSL sale must be for the ISP's *retail* offering. It would be an absurd result for the same word—retail—to be given two different meanings when it is clearly used in the same manner. Even when SBC addresses the use of the word "retail," it glosses over the fact that the AOL Bulk Services Order defined the word to include the exact functions that Qwest is performing in the arrangement.

Sprint further states that because the Commission has allowed other billing and collection arrangements between ILECs and IXCs, it should do so here.[16] Sprint's assertion is inapplicable to the situation here. In situations where an ILEC is performing billing or collection functions for an IXC, there is no dispute that the IXC is offering a service at retail. The Commission's *AOL Bulk Services Order* has already required the ISP, not the ILEC, to perform the billing and collection functions. Indeed, the *AOL Bulk Services Order* indicated that should the ILEC be performing such functions, the ILEC would be providing the service at retail.

Interestingly, Sprint's own comments raise another factor that questions the Qwest/MSN arrangement: financial risk and reward. Sprint proposes that the Commission look at this factor when determining which entity is providing the service at retail.[17] Yet Sprint glosses over the fact that in its original petition, Qwest admitted it received a commission for each customer it signs up for MSN.[18] Thus, Qwest is rewarded financially when it signs up customers. Likewise, Qwest also assumes some of the financial risk—since Qwest advertises and markets for the service, in addition to paying its employees to sign customers up for the service—it loses money when customers do not sign up for the service. Although Sprint claims that Qwest does not bear any of the financial losses that could result, it gives no reason how it has come to that conclusion.

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[16] Sprint at 4.
[17] Sprint at 3.
[18] Cite?

Sprint and SBC both repeat Qwest's argument that if Qwest is providing a retail service, the service is an information service not subject to resale requirements. As support for the argument, the parties cite the Commission's tentative conclusion in its *Broadband Wireline NPRM* that such services are information services. However, the Commission did not release its tentative conclusion until February 15, 2002. Qwest began marketing the MSN service well before that date. Nor can a Commission's tentative conclusion be considered final. The Department and several other parties issued comments in that NPRM disagreeing with the Commission's tentative conclusions and instead asked the Commission to affirm that that the transmission component of broadband internet access is a "telecommunications service" as opposed to "telecommunications" or an :information service."[19]

SBC encourages the Commission to find in favor of Qwest to establish "a comprehensive and consistent national broadband policy."[20] SBC fails to articulate what this "national broadband policy" is or explain how the issue of the nature of the relationship between Qwest and MSN threatens that policy. However, if the national broadband policy SBC envisions means that the FCC should ignore violations of federal tariffs designed to promote fairness and non-discrimination in the provision of advanced telecommunications services, then let the record reflect that the MDOC disagrees with such a national policy. Moreover, if the national policy SBC envisions means that the Telecommunications Act of 1996 should be interpreted in a manner which undermines competition in the market for advanced telecommunications services, and allows new barriers to competitive entry to be erected, let the record reflect the Department disagrees with such a national policy. Moreover, the Department would encourage the FCC (and SBC) to read he recent decision of the United States Circuit Court for the District of Columbia in United States Telephone Ass'n v. FCC, in which the court underscored the difficulty of crafting rules to govern the post-1996 Act world with broad strokes.[21], Should the Commission issue a declaration in favor of Qwest, the Commission would not be preserving a competitive and free market. ISPs depend upon telephone companies like Qwest to provide them with connections to their customers. In many cases, end use customers themselves must make arrangements for these connections. When customers go to a Qwest web page to make the arrangements they are marketed the services of a competing ISP, MSN.

[19] Common Carrier Docket No. 02-33, submitted May 6, 2002. The Department also notes that it raised the issue of the Qwest/MSN relationship in its comments in the proceeding. See the Department's comments at p. 8.
[20] SBC at 6.
[21] United States Telephone Ass'n v. FCC, (May 24, 2002).

Qwest steers other customers, who may not have made an ISP selection, toward MSN without telling them about their other ISP options, even implying that MSN is the only option.[22] If there were multiple willing suppliers of wholesale telecommunications service in the marketplace, there would not be an issue here. However, the reality is that there is only one supplier of wholesale telecommunications services in Minnesota. If that monopoly supplier has retail interests intertwined with its "wholesale offerings" or it enters into agreements which create a legal obligation for it to favor one wholesale customer at the expense of all others, there will never be competitive markets because barriers to market entry are too high to overcome. The types of conduct in which Qwest is engaging with MSN are the very types of conduct that the Telecommunication Act's provisions for non-discriminatory provisioning of wholesale services were designed to prevent. Those provisions must be enforced in order to fully achieve the goals of the Act. Qwest advertises MSN "promotions," such as the free use of a modem, free activation fee, and other fees waived but does not tell consumers of any promotions by other ISPs.[23] Perhaps most disturbing of all is the fact that a customer who is steered toward MSN and subscribes, but then chooses to switch, must actually lose his or her DSL service and experience an outage of several days.[24] This service outage prevents customers, especially business customers dependent on broadband, from being able to switch to another ISP. In a competitive environment, customers would have adequate information to choose their ISP and be able to freely move from one service provider to another, just as they can for long distance services. By limiting information to customers and subsequently imposing a significant barrier to switching ISPs, Qwest discourages competitive choice and acts in an anti-competitive manner.

The Department would like to note that, if the Commission adopts the rationale of Qwest, Sprint, and SBC, the Commission may find itself confronted with future questions and petitions for other services subject to resale requirements. What other services could an ILEC argue it is not providing at retail if it then changes its tariff language to "sell" the service to another entity, who is "solely responsible" for the retail functions, but then contracts the retail functions back to the ILEC?

[22] See the Department's initial comments in this docket at 4, quoting from customers who were told by Qwest employees of MSN ISP products and implying that these were the only products available.
[23] Id. The Department also questioned whether these were in fact MSN promotions, as Qwest labeled them, because at least one of the promotions involved purchasing a Qwest voice product—Custom Choice.
[24] Id at 7. As a resolution of the complaint before the MPUC, Qwest and MSN agreed to allow customers to migrate to their choice of ISP without experiencing outages, but only for a specified period of time. After that deadline, any customer wanting to switch would again experience an outage. The fact that Qwest and MSN were able to allow migrations without outages demonstrates that the outage is not due to technical reasons.

III. The Commission Should Deny Qwest's Petition

For the foregoing reasons and the reasons outlined the Department's initial comments, the Commission should deny Qwest's Petition for a Declaratory Ruling.

/jd

Qwest

Jeff W. Swan
Customer Relations Manager
Qwest
jxswan4@qwest.com
Toll Free (800) 354-8838
FAX (800) 354-9934

	Monthly Rate per Line	Number of Lines	Total Monthly Cost
Centrex 21 Business Package	$ 41.10	3	$ 123.30
Federal Access Charge	$ 4.89	3	$ 14.67
Additional Products Available:			
Business Voice Messaging	$ 9.75	1	$ 9.75
DSL w/ MSN Internet Access	$ 39.95	0	$ -
PCS Wireless	$ 29.99	0	$ -
NEW Monthly Service Cost with Qwest --->			*$ 147.72*

The Centrex 21 package includes a business line and the following standard features:

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Speed calling 30 numbers
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Call forwarding don't answer
Caller ID number only
Call pickup
Message waiting indicator
Hunting
Call forwarding variable

Richard, with this package, all features are included. As I mentioned earlier, I would really like the opportunity to earn your business so I am also offering to ***waive all connection fees*** and give you ***3 months of free service!*** This will result in a credit to you of ***$ 578.16***

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MINNESOTA
DEPARTMENT OF
COMMERCE

JOHN GRINAGER
Senior Rates Analyst
Telecommunications

85 7th Place East, Suite 500
St. Paul, MN 55101-2198

651.296.7530
651.284.4105 (fax)
651.297.3067 (TTY)

john.grinager@state.mn.us
www.commerce.state.mn.us